In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 51

DUPUY H. ANDERSON, ET AL,
Appellants,

v.

WADE O. MARTIN, JR.,
Appellee.

Appeal From the United States District Court for the Eastern District of Louisiana

REPLY BRIEF OF APPELLEE

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STATEMENT

The Complainants, Dupuy H. Anderson and Acie J. Belton, filed the complaint on June 8, 1962 against Wade O. Martin, Jr., Secretary of State of the State of Louisiana, in the United States District Court for the Eastern District of Louisiana, Baton Rouge Division, Civil Action No. 2623. They allege that they are members of the negro race; that Wade O. Martin, Jr., Secretary of State, is expressly charged with the enforcement of Act 538 of the legislature of Louisiana of 1960 (R.S. 18:1174.1); and that the act violates the rights, privileges and immunities of complainants as guaranteed by the First, Fourteenth and Fifteenth Amendments to the Constitution of the United States

secured by Title 42, United States Code, Sections 1971(A) and 1981 to seek and obtain public offices free from state imposed racial distinctions and discriminations and to vote free from abridgements, denials and distinctions imposed by the State.

A majority of a three-judge court on June 29, 1962 decided that the above statute is not in violation of the Fourteenth Amendment and the request for preliminary injunction was denied *(Anderson v. Martin D.C. 1962*, 206 F Supp. 700). The Supreme Court of the United States noted probable jurisdiction and placed the case on the Summary Calendar on February 18, 1963 *(Dupuy H. Anderson et al Appellant, v. Wade O. Martin, Jr.*, No. 634 Supreme Court of the United States, October Term 1962).

The elections referred to in the complaints have long since been held and those officers who have been elected are still serving. The attention of the Court is invited to the fact that the machinery for the primary elections for the State of Louisiana are presently in process. The first primary will be held on December 7, 1963. The second primary will be held on January 11, 1964. (See Appendix of this brief). The Court is respectfully requested to delay its decision in this matter, should the judgment be reversed, otherwise the elections could not be held, as there is not sufficient time to afford a change of ballots and election machinery.

ARGUMENT

Act 538 of 1960 requires that every candidate designate on his application, and that the form of

ballots in primary and general elections, shall show whether the candidate is of the Caucasian race, the Negro race, or other specified race. The sole question is whether the constitutional rights of a negro candidate are abridged when his race, like that of all other candidates, is disclosed on his application, and on the ballot pursuant to State Statute.

Although the complainants allege that the act contravenes their rights under the First, Fourteenth and Fifteenth Amendments of the Constitution, it is difficult to determine precisely which Constitutional Amendment they rely upon. It is obvious that the First Amendment, which in part, refers to abridging the freedom of speech, has no application, and likewise the Fifteenth Amendment has no application because there is nothing in the act which remotely denies or abridges the rights of complainants to vote. There is then left only the Equal Protection and Due Process clauses of the Fourteenth Amendment for consideration.

The courts have never held that a candidate for public office had a right to anonymity. *McDonald v. Key*, 10 Cir. 224 F. 2d 608, held that a requirement of an Oklahoma Statute, that only negroes have their race designated on the ballot violated the Fourteenth Amendment. Specifically, the statute required that any candidate, who is other than the white race, shall have his race designated upon the ballots in parenthesis after his name. Since under the Oklahoma Constitution, the "white race" includes not only members of that race, but members of all other races, except the

negro race, the court held that this resulted in a denial of *equality of treatment* with respect to negroes who run for office. The Louisiana Act (Act 538 of 1960) requires not only the negro to have his race disclosed on the ballot, but it requires the same of the Caucasian, the Mongolian, and any other race. The act therefore specifically requires equality of treatment of all races, including the negro race, and hence, *McDonald v. Key* is no authority for the contentions made by complainants. The dissenting Judge in *Anderson v. Martin* adopted the view that in the Oklahoma case the omission of any racial designation on the ballot amounted to the candidate identifying himself as a white man just as surely as a negro candidate would identify himself by the word "negro" after his name. The court did not so hold in *McDonald v. Key*, and the majority of the court in the present case, did not so hold. It is unrealistic to hold that a state cannot afford a voter an opportunity to see at first glance on a ballot, the race of a candidate, without having to do so through various other means. The Courts have held that anonymity was a right where identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. *NAACP v. Alabama* 357 U.S. 449; *Bates v. Little Rock*, 361 U.S. 516; *Talley v. California*, 362 U.S. 60.

Freedom of speech or association could not possibly be involved in connection with the designation of race on a ballot. In fact, such a designation, should have the effect of encouraging freedom of speech and assembly.

It is said in the dissenting opinion in the present case, that the vice in Act 538 of 1960 is not dependent on injury to negroes, but in the State's placing its power and prestige behind a policy of racial classification inconsistent with the elective processes. The act in no way involves any "dignity of citizenship", because all races are treated alike. Certainly the court would not hold that any statute which uses the word "negro" as well as a person of the Caucasian race, without further distinction, would involve any "dignity of citizenship". If this is true, then a negro as such could not petition a court for relief where "negroes" have been systematically excluded from jury service; to seek relief in the numerous segregation cases, and in numerous instances where the mere use of this word "negro" has not been barred. The cases involving segregation of schools, publicly operated facilities, and the like, have nothing whatever to do with Act 538 of 1960, which is merely an identification statute. A voter should not be required to be "color blind" when it comes to voting for a candidate, because it is his right to vote for whom he pleases, regardless of race or color. The Louisiana law does not *classify* negroes or white people, they are already classified as such.

It would be completely hypocritical and unrealistic for the Supreme Court of the United States, today to say that the Court did not know and does not still know, that there were at least two races in the United States, namely, the Caucasian and the Negro races. (See Dred Scott decision 60 U.S. 393; *Plessy v. Ferguson*, 163 U.S. 537). Every petition in which negroes

have claimed discrimination with relation to criminal action, voting privileges or school integrations have been labelled petitions by negroes, or through class actions or otherwise.

It was well known that the Chief Justice of this Court, when the Senate considered his nomination, was a white man. This is true of every other Justice of the Supreme Court. It goes without saying that the Senate of the United States was entitled to know whether the Chief Justice and the Associate Justices were of the Caucasian or Negro races when their names were submitted for confirmation. The same is true when the name of Thurgood Marshall was submitted for confirmation by the Senate as a Judge of the United States Court of Appeal of the Second Circuit. It cannot be said that Chief Justice Warren, the Associate Justices, or Justice Thurgood Marshall were confirmed simply because they were white people, or negro people, but at least the Senate knew whether they were of the Caucasian or Negro race. It should also be noted, at this point, that the entire set of military records for individuals have appropriate places for the designation of the serviceman's race. Strength charts and other personnel data are computed and include racial categories, and, will continue to be so computed as long as the military forces exist. This is done to identify the serviceman to his supervisors and interested parties, which is exactly what the state is doing in the instant case.

If this Court should decide that in voting for a candidate, the public is not entitled to know whether

the candidate is of the Caucasian or the Negro race, then the decree of the court necessarily means that by labeling a candidate as a negro, this is, per se, the casting of a reflection upon the negro race. In all of the decisions of this court dealing with discrimination of the races, there has never been a decision in which this court has held that it is a stigma, or an unwholesome thing, that a person happens to be a negro. In short, as above pointed out, it is a well known fact that the Court and no one else up to this time, has in any way refused to recognize that a person is in fact either a Caucasian or a Negro, if true. If the Court should find illegal, a requirement that on a ballot the name of the candidate could not be designated as of the Caucasian or Negro race, in that event, the Court must necessarily be of the opinion that it is a stigma to so designate a negro as hereinabove set forth. All of the negroes and all of the white people have a perfect right to know for whom they are voting. All of the white people may choose to vote for a negro, and all of the negroes may choose to vote for a white person, or all of one race may choose to vote for its particular race. The best way for the people to know how to express their choice in any of the eventualities would be for them to see at first hand on the ballot, whom they wish to vote for. It would not do to say that they should be compelled to ascertain these facts by happenstance, accident or otherwise, because like the Senate of the United States, who confirmed the Judges of this Court, they were entitled to know, first hand, the person, his race, his party, or any other facts which would entitle

them to cast a vote of their own choice. The concealing on the ballot, the race of a person can be little different from the concealing of the correct name of the candidate. Certainly, the Supreme Court has no right, under the Constitution, to deprive any voter of any state to a free exercise of choice among candidates, and to deprive such a voter of a right to see the names and the race of a candidate, would be requiring him to vote in the dark, deprive him of the right of exercise of a free choice in voting. In modern concepts, it may well be that in certain segments of the United States, the designation of the race of a man such as Negro might enure to his benefit, and in other segments, the designation of the Caucasian race might enure to the benefit of that race. In either event, the electorate would not be deceived or fooled, and the result of the election would assuredly be the expression of the free will of the people unhindered by any deceptive practices. The Court cannot afford to say that it would be shameful or discriminatory for a candidate to say that he is a Caucasian or to say that he is a Negro, because the Court in too many recent cases, has held that the Constitution as presently interpreted, forbids discrimination between the races. It is inconceivable that the numerous cases which have reached the Supreme Court, would ever have been considered by the Court, unless there were negroes involved in the case. This is particularly true since the Supreme Court nullified *Plessy v. Ferguson*. And now for the Court to take a reverse position, and hold in effect that it is discrimination for a negro to be known as a negro, as a candidate, is simply inconceivable.

In the cases which involved the selection of grand and petit juries in criminal cases, negroes complaining of discrimination have been permitted to prove that they were negroes, and to prove facts to show whether negroes were systematically excluded from jury service. If the law of any state should provide that opposite the name of all persons called for prospective jury service, the race must be designated applicable to all races alike, then certainly if a Negro or a person of the Caucasian race would be entitled to the information without such a designation, no person would have any right to complain if the race is designated in advance opposite the name of any prospective juror. The designation of race for jury service should not be of less importance than the designation of race for voting purposes. As above pointed out, discrimination is not involved, but simply identification.

Louisiana's statute providing for racial designation of candidates on the ballot, most certainly does not deny a "negro" the equal protection of the laws. No matter how much the issue in this case is clouded by irrevelant phrases, there is nothing contained in the statute but pure equality of treatment. If a "negro" is denied an equal opportunity to be elected to a public office in the State of Louisiana, it is purely the result of an unequal number of "Negro" votes cast for him as compared to the number of "Caucasian" race for the same office. The foregoing is predicated upon the assumption that the individual voters will vote simply and purely according to racial lines, which is the main theme of appellant's argu-

ment. It is completely unreal to say that the State must assure a candidate the equal protection of the law here, for the simple reason that the law is not involved. What is involved, is the elector's right to discriminate, and most certainly he is not compelled to give any form of equality of treatment, as he may vote for or against a candidate because he likes or dislikes his name, the way he smiles, the color of his eyes, or, if he so desires, he may pull a certain lever of the voting machine because of its easy access, and his choice of a candidate could be for many, many, reasons, which the voter is not called upon to explain because his ballot is secret. The ballot of the voter, thus being secret, his right to discriminate for any reason is protected.

If, as Appellants assume, voting will be done by racial lines alone, only an equal number of "negro" voters in the State of Louisiana will assure him an equality of treatment, or as he phrases it, "equal protection of the laws."

There is just as much justification for the placing of a candidate's race on the ballot as there is the placing of his name on the same ballot. The State has a duty to identify the candidate to the elector, and the degree to which it accomplishes this end is entirely constitutional as long as all are treated alike. The governmental purpose is an informed electorate, and an informed electorate will discriminate. If this were not so, an election should not be held, for the holding of an election is an opportunity for the elector

to discriminate, to which he is most certainly entitled. By voting for the candidate of his choice, he necessarily votes or discriminates against the remaining ones.

Providing an informed elector is a valid governmental function, and he then becomes a discriminating elector which is the sole reason for conducting, any election held in accordance with established electoral procedures.

CONCLUSION

For the above reasons, the judgment of the lower court should be affirmed.

If for any reason this Court should reverse the decision of the lower three-judge court, the effect on the present election now in process could be problematical, or at least most disturbing and confusing. By September 14, 1963, all candidates for Governor, and most other state officers, as well as the numerous local candidates in the State will have reached the deadline for qualifying in the primaries in the State. They will have complied with Act 538 of 1960, requiring designation of race, and will doubtless have actively begun campaigning for the first primary election to be held on December 7, 1963. The damage which would be caused by an immediate decision might prove insurmountable. It is suggested to the Court that in the event such a decision is rendered, overruling the lower court, that a time of effectiveness be reached at least beyond the time fixed for the present election. (See Appendix) It is noted in the

school segregation cases, that the Court recognized existing obstacles toward immediate complete integration, and instead required integration only with "deliberate speed". (*Brown v. Board of Education of Topeka, Kansas et al*, 349 U.S. 294.)

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CERTIFICATE

I, Jack P. F. Gremillion, a member of the Bar of The United States Supreme Court, hereby certify that the _____ day of September, 1963, a copy of the above and foregoing brief was served on Jack Greenberg, James M. Nabrit, III, 10 Columbus Circle, New York 19, New York, Johnnie A. Jones, 530 South 13th Street, Baton Rouge, Louisiana, Archibald Cox, Burke Marshall, Harold H. Greene, Edgar N. Brown, Department of Justice, Washington, D.C., 20530, by depositing same in the United States mail, postage prepaid.

_____

Of Counsel

APPENDIX I

Election Schedule—Showing Procedure of Secretary of State's office in primary and general election, beginning September 7, 1963 and ending April 1964, as required by Louisiana election laws.

September 7	State Central Committee meets
September 14	Deadline for state candidates to qualify
September 16	Receive certification of state candidates from Mr. Riddle; Mr. Martin numbers state candidates; submit copy on work ballot to printer
September 18	Submit partial copy for absentee and machine ballots to printer
September 25	Mr. Martin issues news release setting deadline for candidates to withdraw (October 7)
October 7, noon	Deadline for candidates to withdraw
October 8	Begin actual printing of absentees
October 25	Complete printing and shipping of absentees
October 21	Begin printing samples and machine ballots
November 1	Complete printing of samples and all machine ballots
November 5	Publish Cards of Instruction in State Times
November 6	Complete printing of all supplies
November 10	Fill all requests and routine mailing for sample ballots

November 15-30	Prepare tabulation sheets for primary election; print Municipal Election Information booklet
December 7	FIRST PRIMARY
December 8	Begin tabulation
December 12	Tabulation should be complete by late afternoon
December 14	Promulgation in State Times
December 16	Begin printing absentees for second primary
December 21	Complete printing of absentees
December 23	Start printing machine ballots and supplies
January 2	Complete printing machine ballots and supplies
January-1st wk.	Preparation of tabulation sheets for second primary; mail approximately 600 municipal election information booklets
January 11	SECOND PRIMARY
January 12	Begin tabulation of second primary
January 15	Print memo ticket for general election
January 17	Promulgate in State Times
January 20	Submit copy for absentees and machine ballots and supplies for general election; begin typing approximately 4,000 commissions, cardex cards, ID cards, labels and posting book (See memo re date for commissions)
January 31	Complete printing of absentees for general election

February 3	Begin printing machine ballots and supplies for general election
February 14	Complete ballots and supplies for general election
February 20	Begin printing absentees for approximately 75 municipal elections
February 20-25	Mail letters of inquiry for Primary Election Information booklet for fall
March 3	GENERAL ELECTION
March 2	Submit copy for Primary Election Information book to Attorney General
March 2	Begin printing machine ballots and supplies for 75 municipal elections
March 6	Begin proclamations for general election
March 13	First day to issue proclamations for general election